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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-647

SAMUEL F. YETTE, *Petitioner*

v.

NEWSWEEK MAGAZINE, NEWSWEEK-WASHINGTON BUREAU, MEL ELFIN, *Respondents*

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
JOHN B. KUHNS

WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D. C. 20006
(202) 331-5000

Attorneys for Respondents Newsweek Magazine, Newsweek-Washington Bureau, Mel Elfin

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QUESTION PRESENTED

Whether the District of Columbia Court of Appeals erred in concluding that there is no substantial evidence in the record to support a finding that petitioner was discharged from his job because of his race.

STATEMENT OF THE CASE

After petitioner, Samuel F. Yette, was discharged as a reporter in the Washington Bureau of Newsweek Magazine, he filed a complaint with the District of Columbia Commission on Human Rights (the "Commission") claiming he was discharged on account of

his race. His complaint against respondents, Newsweek Magazine *et al.*, was based upon Article 47 of the Police Regulations of the District of Columbia, which at the time made it unlawful to discharge an employee "because of [his] race."[1]

Respondents contended that petitioner was discharged not because of his race, but because he repeatedly made himself unavailable for his work and because all the editors who dealt with his work found it inadequate.

After an evidentiary hearing, the Commission found that petitioner's discharge was unlawful. It awarded petitioner $1,000 in damages and $20,000 in attorney's fees, and it ordered Newsweek to establish "an affirmative action program" and to make regular reports to the Commission.

The District of Columbia Court of Appeals reversed the Commission's order. It held "that the Commission's findings of fact . . . were incomplete and more importantly that they were not supported by substantial evidence." App.B, p. 21a.[2] The Court noted that the Commission's decision failed to include findings as to each contested issue of fact, as required by D.C. law.[3] In particular, the Court observed that the Commission made no findings whatsoever on respondents' "rather

[1] On November 17, 1973, during the pendency of this litigation, the District of Columbia enacted a new antidiscrimination provision, which repealed Article 47 except for claims arising before November 17, 1973. Human Rights Law (Title 34, DCRR), § 1, 20 D.C. Reg. 345 (1973).

[2] Appendix citations are to the Appendix to the Petition for a Writ of Certiorari.

[3] D.C. Code § 1-1509(e) (1973).

extensive" evidence "regarding [petitioner's] performance [and] the magazine's reasons for terminating him." App.B, pp. 35a, 15a n.2. Undertaking its own review of the record, the Court found no substantial evidence that petitioner was discharged because of his race. It concluded that respondents acted lawfully "even under the most liberal reading of the Title VII test." App.B, p. 33a.[4]

Petitioner filed a Petition for Rehearing *En Banc* in the Court of Appeals, but the Petition was denied. Judge Mack, joined by Chief Judge Newman, dissented from the denial of the Petition, expressing the view that whatever the adequacy of the Commission's written findings, its ultimate finding of racial discrimination had substantial support in the record. App.C, pp. 43a-44a.

REASONS FOR DENYING THE WRIT

1. The Court Of Appeals Correctly Applied The Clearly Established Principles That Govern This Case

In its present posture, this case presents no serious legal issue. The Court of Appeals thoroughly canvassed the various tests of unlawful discrimination, and concluded that "the evidence offered by intervenor Yette [petitioner herein] does not meet any of the tests outlined above." App.B, p. 31a. The Court explicitly held that there was "no substantial evidence in the record" to support a finding of illegal discrimination "even un-

[4] The Court of Appeals also held that Article 47 of the D.C. Police Regulations does not authorize any of the relief granted by the Commission—an award of monetary damages and attorney's fees, or the issuance of an affirmative action plan. App.B, pp. 19a, 38a. This aspect of the Court's ruling is not challenged in the Petition.

der the most liberal reading of the Title VII test." App.B, p. 33a.[5]

Petitioner has suggested that the Court of Appeals applied an erroneous standard of proof in assessing the substantiality of the evidence in this case—in particular that the Court placed undue emphasis on respondents' motivation, in disregard of this Court's observation in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971), that Title VII is directed to the "*consequences* of employment practices, not simply the motivation." There is no merit to this contention.

The legal principles that govern cases like this one, in particular the relevance of motivation, are matters that this Court has recently noted "are relatively clear." *International Brotherhood of Teamsters* v. *United States*, 45 U.S.L.W. 4506, 4508 (U.S. May 31, 1977). And the Court of Appeals' decision is completely consistent with those principles.

In *International Brotherhood of Teamsters*, the Court observed that there are two types of discrimination claims. There are, as in this case, claims of "disparate treatment"—that an employer "treats some people less favorably than others because of their race . . . ." 45 U.S.L.W. at 4509 n. 15. And there are, as in *Griggs*, claims of "disparate impact"—that an employer engages in practices "that are facially neutral . . . but that in fact fall more harshly on one group than another and cannot be justified by business neces-

[5] Respondents are willing to assume that the legal standards under Article 47 of the D.C. Police Regulations, which governs this case, are the same as those under Title VII. But the fact that this case is governed by a D.C. Police Regulation that has been repealed, see note 1 *supra*, provides an additional reason for this Court to deny the Petition.

sity." *Ibid.* While proof of discriminatory motive is not required in a "disparate impact" case, it is "critical" to a "disparate treatment" case. *Ibid.*[6]

In this case it would have been sufficient for the Court of Appeals to conclude that there was no substantial evidence of discriminatory motive to support a "disparate treatment" claim. However, the Court not only found that there was no substantial evidence to support a "disparate treatment" claim, but also found there was no substantial evidence to sustain a "disparate impact" claim. Thus embracing both of these conclusions, the Court held:

> "There is no substantial evidence in the record to establish that the conduct of [respondents] complained of was taken because of the race of the [petitioner] *or* that it caused him illegal discriminatory harm and was not the result of business necessity." App.B, p. 33a (emphasis added).

Petitioner takes issue with the Court of Appeals' statement that his "failure to establish that his termination was motivated by a purpose to discriminate is of no little significance." App.B, p. 34a. But that statement is, if anything, an understatement of the critical importance of motive in a disparate treatment case. It is certainly unexceptionable when read together with the remainder of the sentence that petitioner omits to quote—that the failure to establish discriminatory motive is of no little significance "in view of Newsweek's

[6] Although the Supreme Court explained that discriminatory motive "can in some situations be inferred from the mere fact of differences in treatment," 45 U.S.L.W. at 4509 n. 15, the court below correctly found that the record in this case affords no basis whatsoever for an inference of discriminatory motive. See pp. 6-8, *infra*.

detailed evidence that it was for justifiable business or professional reasons that it terminated Mr. Yette's employment." *Ibid.*

The Court of Appeals held, quite simply, that there is no substantial evidence in the record to support any conclusion other than that petitioner was discharged because his work was inadequate.[7] Under no conceivable statutory standard can such a discharge be termed unlawful.

2. The Purely Factual Issue In This Case Does Not Warrant Further Review

The issue in this case is a purely factual one—whether there is substantial evidence in the record to support a finding that petitioner was discharged because of his race, rather than because of the quality of his work. This factual issue was considered carefully by the Court of Appeals, and does not warrant further review by this Court.

The record in this case establishes quite clearly that the sole reason for petitioner's termination at Newsweek was the inadequacy of his work. As the Court of Appeals noted, respondent offered "detailed evidence that it was for justifiable business or professional reasons that it terminated Mr. Yette's employment."

[7] Any doubts as to the allocation of the burden of proof were resolved in petitioner's favor. The Court assumed that petitioner had established a *prima facie* case, and held that even if the burden was upon respondents to show a nondiscriminatory purpose, there was no substantial evidence to support a judgment in petitioner's favor. App.B, pp. 35a-36a. If the question were to assume dispositive significance, respondents would insist that petitioner had the burden of proving that his work was satisfactory as part of his *prima facie* case. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).

App.B, p. 34a. Petitioner distorts the evidence when he states that "numerous qualified individuals both inside and outside the Newsweek organization attested to Mr. Yette's excellence as a journalist." Pet. 10. The fact is, as the Court of Appeals noted, that the petitioner "offered no witnesses other than himself to testify either to acts of discrimination, or the quality of his work at Newsweek." App.B, p. 14a. Apart from petitioner's own testimony and written comments reflecting occasional praise of a particular file prepared by petitioner, there was absolutely no evidence that *any* editor at Newsweek was satisfied with petitioner's work over an extended period of time. There was, in fact, universal agreement among those who had to deal with petitioner's work that it was inadequate. Seven editors testified to the inadequacy of petitioner's work at the hearing before the Commission, and there was additional testimony that five other editors had expressed dissatisfaction with petitioner's work.[8]

[8] The testimony showed in detail the precise criticisms made of petitioner's files by those who had to deal with them. The files were unresponsive to the queries sent by the writers and editors in New York who had the responsibility of preparing articles from the news gathered by petitioner. (Tr. 800, 810, 811-12.) They lacked the basic facts needed for stories. (Tr. 664-66, 675-76, 720, 797, 818.) They lacked the necessary colorful quotations, anecdotes, and factual details. (Tr. 472, 585, 663-64, 720.) They failed to focus on the salient, newsworthy issues (Tr. 637, 657-58), and were lacking in analysis and good judgment (Tr. 577, 638-39, 720, 810). They were also lacking in balance—fairness to both sides of a controversial issue. (Tr. 576, 578, 640-41, 797, 800.) Finally, they were often inaccurate (Tr. 574-75, 577, 810-11), poorly organized (Tr. 472, 720, 810), excessively long and verbose (Tr. 472, 575, 577, 720, 797, 810), and late (Tr. 663-64).

In addition, there was ample testimony that petitioner consistently made himself unavailable for work by failing to appear in the office or inform the Bureau Chief of his whereabouts. (Tr. 472-74, 749-52, 784, 800-01.)

Petitioner has made reference in his Petition to several allegations of discriminatory treatment during his employment at Newsweek. Once again, however, the record contains no evidence apart from petitioner's testimony to support those allegations, see App.B, pp. 14a, 33a-34a, and the record as a whole totally refutes them.[9]

The Court of Appeals was clearly correct in holding that there was no substantial evidence to support a finding that petitioner was discharged because of his race. No purpose would be served by this Court's granting further review of the evidence.

CONCLUSION

This Court has clearly articulated the legal principles that govern this case. Giving those principles "the most liberal reading," the Court of Appeals held that

[9] No useful purpose would be served at this stage of the proceedings by engaging petitioner in a detailed debate over the evidence in the record. It should be noted, however, that the "facts" petitioner suggests "were not substantially in dispute," Pet. 9, were very much in dispute. And the record as a whole refutes petitioner's presentation of the evidence. One example should suffice. Petitioner states that "over his protests" he was "subjected to racially offensive nicknames, including 'Sambo,' by his supervisor and fellow employees." Pet. 10. Petitioner was addressed as "Sambo" on one occasion by a fellow employee who apologized when petitioner objected and subsequently developed, in petitioner's words, a "convivial" relationship with him. (Tr. 399.) The Bureau Chief, against whom the allegation of racist nicknames was made, did address petitioner as "Buster" and "Pussycat." But neither of these nicknames has any history of racially derogatory connotations. And the Bureau Chief testified that he used these and similar terms indiscriminately to refer to petitioner's white colleagues as well, that he did not intend these nicknames to be derogatory, and that he ceased calling petitioner by nicknames when he became aware that petitioner took offense. (Tr. 475-76.)

there was no substantial evidence to support a finding of racial discrimination. The issue in this case is thus a purely factual one that does not warrant this Court's attention.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
JOHN B. KUHNS

WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D. C. 20006
(202) 331-5000

Attorneys for Respondents Newsweek Magazine, Newsweek-Washington Bureau, Mel Elfin